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Paper No. 20  
GDH/gdh

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re **Ed Tucker Distributor, Inc.**

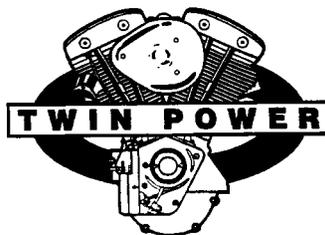
Serial No. 75/**333,969**

**Kay Lyn Schwartz** of **Gardere Wynne Sewell LLP** for **Ed Tucker Distributor, Inc.**

**John M. Gartner**, Trademark Examining Attorney, Law Office 102  
(**Thomas Shaw**, Managing Attorney).

Before **Simms, Hohein** and **Rogers**, Administrative Trademark Judges.  
Opinion by **Hohein**, Administrative Trademark Judge:

**Ed Tucker Distributor, Inc., d.b.a. Tucker-Rocky Distributing**, has filed an application to register the mark "TWIN



POWER" and design, as reproduced below,  
for the following goods:<sup>1</sup>

<sup>1</sup> Ser. No. 75/333,969, filed on July 31, 1997, which alleges dates of first use of September 1, 1995 for the goods in each class. The graphic representation in the mark of a motorcycle engine is

"motorcycle motor oil, sold exclusively by authorized distributors" in International Class 4;

"motor parts and accessories of motorcycles, namely, oil filters, bearings, woodruff keys, shims and carb kits comprised of o-rings, jets and gaskets; short blocks, rods, cylinders, pistons, oil pumps, valves and guides, ignition coils, distributors, electronic ignitions, voltage regulators, starter motors and starter rotors, sold exclusively by authorized distributors" in International Class 7; and

"structural and drive train parts of motorcycles, namely, chains, transmissions [sic] gears and shafts, clutches, primary drive parts comprised of pulleys, idlers, chains and clutches; shifter assembly parts comprised of control rods and levers, mounting brackets and lever arms; transmission cases, and mechanical advance assemblies comprised of weights and springs, sold exclusively by authorized distributors" in International Class 12.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "TWIN POWER," which is registered for "transmission belts,"<sup>2</sup> as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to

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disclaimed and the lining is a feature of the mark and does not indicate color.

<sup>2</sup> Reg. No. 915,103, issued on June 15, 1971, which sets forth dates of first use of October 16, 1970; renewed.

the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), "in any likelihood of confusion analysis[,] two key considerations are the similarity of the goods and the similarity of the marks."<sup>3</sup> Moreover, while both the Examining Attorney and applicant have speculated as to whether registrant's mark is or is not famous, suffice it to say that, inasmuch as there simply is no evidence of record with respect to the fame of the prior mark, such *du Pont* factor is irrelevant.<sup>4</sup>

Turning first to consideration of the respective marks, applicant insists that while "the marks share the words 'TWIN

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<sup>3</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

<sup>4</sup> Applicant and the Examining Attorney also dispute the effect of another *du Pont* factor, namely, the nature and extent of any actual confusion. Applicant, in this regard, relies upon the statement in a declaration from its chief financial officer that applicant "is not aware of any instance of actual confusion between its mark 'TWIN POWER and design,' the subject of the pending application, and the registered mark 'TWIN POWER[,] which is currently owned by Gates Rubber Company ('Gates')." While the absence of any incidents of actual confusion over a significant period of time is indeed a factor indicative of no likelihood of confusion, it is a meaningful factor only where the record demonstrates appreciable and continuous use by an applicant of its mark in the same markets as those served by the cited registrant under its mark. See, e.g., Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992) and cases cited therein. Here, there is no information as to the nature and extent, if any, of contemporaneous use by registrant of its mark in the same marketplaces as those served by applicant, so that it could be said that if confusion were likely to occur, it would be expected to have happened. Consequently, applicant's assertion of a lack of any reported incidents of actual confusion is simply not a mitigating factor in this appeal. Compare In re General Motors Corp., 23 USPQ2d 1465, 1470-71 (TTAB 1992).

POWER,' the marks in their entirety are dissimilar." Applicant argues, in particular, that its mark "is visually distinctive from the cited mark" inasmuch as the former "includes the distinctive engine design that consists of an engine encompassed by a circle," and maintains that such "design element is the dominant part of the [applicant's] mark, not the phrase 'TWIN POWER.'" Applicant also contends, based upon two third-party registrations and the results of an Internet search, that "the common phrase 'TWIN POWER' in Registrant's and Applicant's mark is relatively weak" and therefore registrant's mark should only be "given a narrow scope of protection."

While, of course, it is settled that the marks at issue must be considered in their entirety in determining whether there is a likelihood of confusion, it is also well established that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ...." 224 USPQ at 751.

We agree with the Examining Attorney that, when considered in their entirety, applicant's "TWIN POWER" and design mark so resembles registrant's "TWIN POWER" mark that, if

used in connection with the same or closely related goods, confusion as to source or sponsorship is likely to occur. Specifically, we concur with the Examining Attorney that, on the whole, the dominant and distinguishing portion of applicant's mark is the phrase "TWIN POWER," which plainly is identical to registrant's mark. As the Examining Attorney notes, and as evidenced by applicant's disclaimer thereof, the Harley-Davidson engine design in applicant's mark<sup>5</sup> is "an accurate pictorial representation of descriptive matter (a V-Twin motorcycle engine), rather than a stylized representation." Therefore, notwithstanding the prominent appearance of both such design and the phrase "TWIN POWER" in applicant's mark, it is the phrase "TWIN POWER" which principally serves as the source-indicative element of applicant's composite mark, with the non-distinctive background oval design functioning simply as a subordinate vehicle for the display of the other elements of the mark. Moreover, the phrase "TWIN POWER," as the sole literal element of applicant's mark, is the portion thereof which would be used by customers when calling for or asking about applicant's goods. Such phrase is thus the portion of applicant's mark which is most likely, especially in light of the descriptiveness of the engine design component, to be impressed upon consumers as the dominant and source-signifying portion of applicant's mark. See, e.g., In re Appetito Provisions Co., Inc., 3 USPQ2d 1553, 1554 (TTAB 1987).

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<sup>5</sup> We observe that the catalogs submitted by applicant as facsimiles of its use of its mark tout applicant's goods as "PERFORMANCE PRODUCTS

Accordingly, and while differences admittedly exist between the respective marks when viewed on the basis of a side-by-side comparison,<sup>6</sup> in their entireties the marks are not only similar in appearance, due to the shared phrase "TWIN POWER," but in light thereof that they are substantially identical for all practical purposes in sound, connotation and commercial impression. Applicant's further contention, however, that such marks can coexist because the words "twin power" have been shown to be in common use is not persuasive for the following reasons.

First, applicant points to just two third-party registrations which "encompass the mark, 'TWIN POWER:' (1) 'SINGLE/TWIN POWER' for aircraft, namely, helicopters; and (2) 'TWIN POWER' for laundry care products." However, aside from not constituting evidence of use of the subject marks and that the purchasing public has become conditioned to encountering certain products under the phrase "TWIN POWER" and is therefore able to distinguish the source thereof,<sup>7</sup> such registrations do not demonstrate, as the Examining Attorney notes, that a mark which

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FOR YOUR HARLEY®."

<sup>6</sup> Such a comparison, however, is not the proper test to be used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); and *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973).

<sup>7</sup> See, e.g., *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) and *In re Hub Distributing, Inc.*, 218 USPQ 284, 285-86 (TTAB 1983).

consists of or contains the phrase "TWIN POWER" "is weak when used in connection with [land] vehicle parts."

Second, applicant also relies upon a declaration from its counsel which states, inter alia, that she had an Internet search conducted "regarding advertisements containing the terms 'TWIN POWER,' 'TWIN' and 'POWER'"; that "[t]he results of the search of sites containing the terms 'TWIN POWER,' 'TWIN' and 'POWER' revealed 2,710,628 matches," of which "[a] copy of the first page of search results is attached"; and that additionally "attached are some of the randomly chosen search results which set forth use of the term 'TWIN POWER'" in connection with "a variety of products/services, including tractors, boats, automobiles and motorcycles." However, contrary to counsel's conclusion in her declaration that "[s]uch extensive use in the transportation industry clearly shows the weakness of this phrase," we have no idea as to even the approximate number of uses of the relevant phrase "TWIN POWER," much less (except for a few examples) the context of such use. Thus, as the Examining Attorney observes, "the fact that applicant received 2,710,628 matches for the terms TWIN and POWER [is not itself] evidence of ... weakness, since the matches include all web sites that happen to contain the term TWIN and POWER somewhere on the site."

Furthermore, to the extent that the few selected examples provided by applicant show the actual manner of use of such phrase, they run the gamut from references to apparent trademark use (1938 "Twin Power Challenger" tractors, "HKS Racing

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Twin Power" automobile ignition and "Gemini Twinpower" automotive and marine batteries) to seemingly descriptive usage (outboard motors utilized as "twin power plants" for boats, and "twin power units" in a "hybrid car"). The latter usage, however, is only in instances where the phrase is used to refer to more than one of the same kind of item; there is nothing which shows that such phrase merely describes any single product. The phrase "TWIN POWER" plainly cannot be said, at least on this record, to be of limited trademark significance. Nonetheless, even if, in light of applicant's Internet search, such phrase were to be regarded as highly suggestive, rather than arbitrary or fanciful, as used in connection with applicant's and registrant's goods, it is still the case that in the marks at issue the phrase conveys the same connotation and engenders the same overall commercial impression, given the descriptiveness inherent in the graphic representation of a motorcycle engine design in applicant's mark.

This brings us to consideration of the respective goods. In this regard, it is well established that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ

590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Furthermore, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and cited registration. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where the goods in the application at issue and in the cited registration are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be normal for such goods and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Applicant, contending that the Examining Attorney "may not speculate as to the possible expansion of Registrant's goods" but must instead, as noted above, "rely upon the description of the goods in the cited registration," argues that:

The goods marketed in connection with Applicant's mark are distinctly different from those goods marketed by the cited Registrant under the [mark in the] cited registration. Applicant sells a variety of items exclusively for motorcycles. Registrant provides a single item (i.e., transmission belts) which is sold to the automotive industry, as opposed to the

motorcycle industry. .... Indeed, there is a clear distinction in the variety of goods offered by Applicant versus Registrant.

With respect to the channels of trade for the respective products, applicant asserts that the market for its goods "is distinctively different" from the market for registrant's goods. Applicant maintains, therefore, that given the diversity of products and their respective trade channels, confusion is not likely to occur.

In support of its position, applicant relies upon the declaration of Joe Rougraff, its chief financial officer, and excerpts from registrant's website submitted in connection therewith. The declaration, which refers to applicant as "Ed Tucker," provides in pertinent part that:<sup>8</sup>

With regards to channels of trade, Ed Tucker does not sell the products marketed under the subject mark directly to retail customers. Ed Tucker only sells its products to authorized distributors who subsequently sell to retail customers. As evidenced by the attached printout, it is believed that [registrant] Gates' goods are exclusively manufactured for the automotive industry, as opposed to the motorcycle industry, [and are sold] through normal retail channels. ....

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<sup>8</sup> We also observe, on another matter, that while such declaration indicates that "Ed Tucker was the original applicant for the mark 'TWIN POWER and design,'" the declaration further states that "[o]n or about November 26, 1997, the rights in the mark 'TWIN POWER and design' were transferred to Tucker-Rocky Corporation, Inc." and that "Ed Tucker subsequently became the exclusive licensee for the mark 'TWIN POWER and design.'" If, as it appears, applicant is not presently the owner of the subject mark and involved application, it is suggested that, in the event applicant ultimately prevails in this appeal, a certified copy of the assignment or other document(s) transferring ownership thereof to Tucker-Rocky Corporation be recorded against the application in the Assignment Branch of the United States Patent and Trademark Office so that the resulting registration will issue in the name of the actual owner of the "TWIN POWER" and design marks. See, e.g., TMEP §§502.01 and 503.09.

The automotive industry is a completely separate industry as compared to the motorcycle industry. Motorcycles are generally viewed as recreational vehicles. Accordingly, the ultimate consumers of Applicant's goods are relatively sophisticated due to the nature of the specialized goods for which they are intended to be used.

In light of the above, applicant insists that its goods "are directed to different consumers" and "are sold exclusively through authorized distributors who then market Applicant's goods to the end user." Applicant stresses, in particular, that unlike registrant's transmission belts, its goods "are not found in auto parts stores, or for that matter any retail stores," and that, generally speaking, for the Examining Attorney "[t]o assume that motorcycle parts and accessories are sold in auto parts stores is an incorrect assumption by the Examiner." Although applicant never discloses, in either its main or reply brief, the specific kinds of entities which serve as its "authorized distributors," it appears from the catalogs submitted as facsimiles in the application that such distributors are wholesalers of motorcycle parts and accessories, who in turn sell such goods to retail dealers for sale to the general public.<sup>9</sup>

The Examining Attorney, on the other hand, takes the position that "[t]he similarities among the marks and the goods ... are so great as to create a likelihood of confusion" since,

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<sup>9</sup> For instance, such catalog states that "NEMPCO is a wholesale distributor and does not sell retail. Twin Power products, and all items distributed by NEMPCO are available through Authorized NEMPCO Dealers. Call our dealer referral hotline ... for the dealer nearest you."

as to the respective goods, the marks at issue "are used to identify vehicle parts" and, hence, "[t]he same consumers will be exposed to the goods identified with both marks." In an attempt to bolster his claim that applicant's and registrant's goods are closely related in a meaningful commercial sense, the Examining Attorney asserts that he "has made of record dozens of third-party registrations showing that the manufacturers of automobile parts also manufacture motorcycle parts." Aside, however, from the fact many of those registrations issued pursuant to the provisions of Section 44 of the Trademark Act, 15 U.S.C. §1126, based upon ownership of a foreign registration rather than use in commerce, and thus are essentially of no probative value,<sup>10</sup> it appears that of the remaining third-party registrations which issued on the basis of use in commerce, at most only two or three arguably cover both registrant's goods (transmission belts) and one or more of applicant's various products (motorcycle motor

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<sup>10</sup> As stated in *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6:

Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See: *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 484 (TTAB 1985), and *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986). ....

However, as to third-party registrations which are based upon foreign registrations, the Board pointed out that such registrations "are not even necessarily evidence of a serious intent to use the marks shown therein in the United States on all of the listed goods ..., and they have very little, if any, persuasive value on the point for which they were offered." Id.

oil, motorcycle motor parts and accessories, and motorcycle structural and drive train parts).

Additionally, the Examining Attorney maintains that he "has made of record dozens of print advertisements, web-page printouts, and third-party registrations showing that retailers who sell automotive parts also sell motorcycle parts." Again, many of the third-party registrations are not based upon use of the subject marks in commerce and, thus, as explained above, are without any significant probative value. More importantly, it appears in any event that none of the third-party registrations actually encompasses such services as automobile and motorcycle dealerships or otherwise cover the marketing of automobile and motorcycle parts and accessories by the same retailer. While, in addition, there are several examples of Internet and mail-order catalog retailers, who generally appear to offer a huge variety of automobile and motorcycle parts and accessories, and there are a few pages of print advertisements by an automotive parts store showing that such a retailer also markets motorcycle spark plugs and batteries, there is no evidence which specifically reveals that a single outlet markets both goods of the kind identified in the cited registration as well as one or more of the types of products set forth in applicant's application.

Nevertheless, despite the deficiencies in the evidence presented by the Examining Attorney, we find that as identified in the cited registration and in the application, registrant's and applicant's goods are on their face closely related products for motorcycles. This is because "transmission belts," which is

the language utilized by registrant to designate its goods, is a broad and unrestricted term which not only covers automobile transmission belts, as applicant concedes, but also includes both belts used as motorcycle transmission components and belts used to transmit power from a motorcycle engine to the rear wheel of such a vehicle. In fact, contrary to the assertions in its briefs and the Rougraff declaration, in which applicant attempts to restrict registrant's goods to those manufactured for the automotive industry, applicant in its response to the initial Office Action admitted that "[r]egistrant's goods are directed to all kinds and types of *vehicles*," (emphasis added), a concession which obviously encompasses transmission belts for motorcycles as well as for automobiles. Plainly, registrant's "transmission belts" include those which would be suitable for sale by wholesale distributors of motorcycle parts and accessories, as are applicant's goods, as well as by retailers of such products, where applicant's goods would likewise be found.

Furthermore, applicant's apparent attempt to limit its various products to those "sold exclusively by authorized distributors" does not constitute a meaningful restriction as to the channels of trade for its goods inasmuch as such language clearly encompasses not only applicant's wholesale distributors, who do not sell its goods at retail, but also includes all motorcycle parts and accessories retailers, regardless of whether they are mail-order, Internet or retail store based, who likewise could be considered "authorized distributors" if they were to be designated by applicant as exclusive sellers of its motorcycle

motor oil, motorcycle motor parts and accessories, and motorcycle structural and drive train parts.

Therefore, as identified, both registrant's and applicant's goods are closely related products for motorcycles which would be sold through the same channels of trade to the same classes of purchasers. When respectively marketed under the substantially identical marks "TWIN POWER" and "TWIN POWER" and design, confusion as to the origin or affiliation of such goods would be likely.

Applicant argues, as a final contention, that confusion is not likely because "the ultimate consumer of Applicant's goods is relatively sophisticated due to the nature of the specialized goods." In consequence thereof, applicant urges that the care inherent in the purchase of its products will preclude any likelihood of confusion with registrant's goods. The Examining Attorney, however, argues that applicant "has failed to provide any credible evidence to support its contention that the purchasers of its goods are sophisticated consumers and therefore immune from source confusion." Instead, according to the Examining Attorney:

The record shows, to the contrary, that the goods identified by applicant's mark are relatively inexpensive goods that would require no more sophistication from ... purchasers than that possessed by the average motorcycle owner. The products catalog supplied by applicant ... shows that applicant sells, for example, oil and lubricants (all under \$10.00); oil filters (under \$10.00); coils (\$35.00 to \$40.00); voltage regulators (\$50.00 to \$82.00); clutch kits (\$35.00 to \$60.00) and transmission parts and gear sets (\$5.00 to \$145.00). Some

items are more expensive (an engine block sells for \$3,000.00) but the majority of the goods are relatively inexpensive motorcycle parts and supplies. Nothing in the record suggests that purchasers of standard motorcycle parts and supplies are sophisticated purchasers.

We need not decide whether customers for applicant's various motorcycle related parts and accessories are indeed highly sophisticated and discriminating, although certainly the substantial majority of its customers would be ordinary consumers who, especially with respect to purchases of its more inexpensive products, would not seem to have a need to exercise much care or contemplation in their selections. In any event, we observe that, even if customers for applicant's goods, as well as those for registrant's transmission belts, were to be regarded as sophisticated and discriminating buyers (despite the absence on this record of any evidence other than the conclusory statements by applicant's chief financial officer that motorcycles are generally viewed as recreational vehicles and that consumers of its goods are relatively sophisticated due to the nature of its goods), the fact that consumers may need to exercise some care or thought in choosing the respective products "does not necessarily preclude their mistaking one trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also *In re Decombe*, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983).

Accordingly, we conclude that because, when considered in their entirety, applicant's "TWIN POWER" and design mark is substantially identical to registrant's "TWIN POWER" mark, the contemporaneous use thereof in conjunction with, respectively, applicant's motorcycle motor oil, motorcycle motor parts and accessories, and motorcycle structural and drive train parts, all of which are sold exclusively by authorized distributors, and registrant's transmission belts, particularly those for use with motorcycles, is likely to cause confusion, even among knowledgeable and discriminating consumers of such closely related goods.

**Decision:** The refusal under Section 2(d) is affirmed.